



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 206

[Docket DARS-2019-0051]

RIN 0750-AK67

Defense Federal Acquisition Regulation Supplement: Exception to Competition for Certain Follow-on Production Contracts (DFARS Case 2019-D031)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that modifies the criteria required to exempt from competition certain follow-on production contracts.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 50811 on September 26, 2019, to amend DFARS 206.001 to implement section 815 of the National Defense Authorization Act (NDAA) for

Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 815 repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b, which modifies the authority of DoD to carry out other transaction (OT) agreements for prototype projects, as well as the criteria required to award an associated follow-on production contract to the participants in the other transaction agreement without the use of competitive procedures. One respondent submitted comments on the proposed rule.

II. Discussion and Analysis

A. Summary of Significant Changes.

The purpose of this rule is to provide contracting officers with updated internal guidance when awarding a follow-on production contract that is exempt from the competitive procedures of Federal Acquisition Regulation part 6, as set forth in 10 U.S.C. 2371b. The rule is not intended to implement policy, regulation, or guidance on DoD's authority to enter into OT prototype agreements at 10 U.S.C. 2371b. As such, this final rule changes the rule text to specify that the agreements officer for the OT agreement for the prototype project is responsible for providing to the contracting officer information that confirms the requirements to award a noncompetitive follow-on production contract, as specified in 10 U.S.C. 2371b and DoD OT agreement policy, have been met.

B. Analysis of public comments.

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

Comment: The respondent advised that DoD should provide clear guidance on what constitutes "successful completion" of a prototype transaction; the rule text should be clarified to explain what it means to award a follow-on production contract to "the participants in the transaction," as contracts are usually made between the Government and a single entity; the rule should clarify what a "participant" is, given that not all parties to a transaction necessarily participate in the project.

The respondent also advised that the rule should be revised to clarify the prerequisites for awarding the OT for the prototype project and the prerequisites for awarding a follow-on production contract. Specifically, one of the criteria for awarding a follow-on production contract is that the OT for the prototype project is based on specific determinations made by certain acquisition officials according to different threshold values. The proposed rule, however, applies these determination requirements only to the follow-on production contract, when they should instead apply only to the initial OT agreement.

Response: This rule is not intended to implement policy, regulation, or guidance on DoD's authority to enter into OT prototype agreements at 10 U.S.C. 2371b. Instead, the Office of the Under Secretary of Defense for Acquisition and Sustainment

(OUSD(A&S)) is the organization responsible for promulgation of policy for OT agreements, which can be viewed at <https://aaf.dau.edu/aaf/ot-guide/>. As a result, this rule is modified to clarify that the contracting officer does not make the determination that the prototype project was successfully completed and, instead, should receive that information from the agreements officer for the OT agreement.

Comment: The respondent advised that 32 CFR part 3 should be updated to reflect the current authority at 10 U.S.C. 2371b.

Response: This comment is outside the scope of this rule, which amends 48 CFR chapter 2.

C. Other Changes.

The proposed numbering of the DFARS text is redesignated as DFARS 206.001-70 from 206.001(S-70) to align with FAR system drafting conventions.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products Including Commercially Available Off-the-Shelf Items, and for Commercial Services

This rule only impacts the internal operating procedures of the agency. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92), which repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b.

The objective of this rule is to provide contracting officers with updated internal guidance when awarding a follow-on production contract that is exempt from the competitive procedures of Federal Acquisition Regulation part 6, as set forth in 10 U.S.C. 2371b.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD does not collect data on the number of follow-on production contracts that are awarded annually and associated with a prototype project transaction agreement made under the authority of 10 U.S.C. 2371b; therefore, DoD is unable to estimate the number of small entities that will be impacted by this rule. However, DoD does not expect small entities to be significantly impacted by this rule, because the rule does not change any existing processes or impose any additional burdens. Instead, the rule simply clarifies instructions to contracting officers on the criteria that must be met in order to award an associated follow-on production contract without using competitive procedures.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternative approaches to the rule that would meet the stated objectives.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 206

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is amended as follows:

PART 206—COMPETITION REQUIREMENTS

1. The authority citation for 48 CFR part 206 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

206.001 [Amended]

2. Amend section 206.001 by removing paragraph (S-70).

3. Add section 206.001-70 to read as follows:

206.001-70 Exception for prototype projects for follow-on production contracts.

(a) Also excepted from this part are follow-on production contracts for products developed pursuant to the "other

transactions" authority of 10 U.S.C. 2371b for prototype projects when—

(1) The other transaction solicitation and agreement included provisions for a follow-on production contract; and

(2) The contracting officer receives sufficient documentation from the agreements officer of the other transaction agreement for the prototype project that the requirements of 10 U.S.C. 2371b sections (f) (2) (A) and (B) and, when applicable, section (a) (2), have been met.

(b) See PGI 206.001-70(b) for additional guidance.